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Office of Administrative Law Judges
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Issue date: 27Aug2002

Case No.: 2001-LHC-02753

OWCP No.: 1-149639

In the Matter of:

DONNA M. BANIA
(Widow of WILLIAM F. BANIA)
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insurer

and

WESTINGHOUSE ELECTRIC CORPORATION
Employer

APPEARANCES:

Stephen C. Embry, Esq.
Melissa M. Olson, Esq.
For the Claimant

Edward W. Murphy, Esq.
Danielle R. Solod, Esq.
For the Employer/Self-Insurer

Elizabeth Flynn, Esq.
For Westinghouse Electric

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: DAVID W. DI NARDI
District Chief Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on March 29, 2002 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, Alj EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit, EX for an exhibit offered by Westinghouse Electric and RX for an exhibit offered by Electric Boat. This decision is being rendered after having given full consideration to the entire record.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.
2. Decedent and both Employers were in an employee-employer relationship at certain times.
3. Claimant alleges that her husband suffered an injury on November 19, 1999 in the course and scope of his employment and that his death on March 30, 2000 was causally related to such injury.
4. Claimant gave the Employer notice of the injury in a timely fashion.
5. Claimant filed timely claims for compensation and the Employer filed timely notices of controversion.
6. The parties attended an informal conference on June 20, 2001.
7. The applicable average weekly wage is \$450.64, the National Average Weekly Wage as of the date of Decedent's injury and death.
8. Neither employer has paid any benefits herein.

The unresolved issues in this proceeding are:

1. Whether Decedent's lung cancer is causally related to his maritime employment.
2. If so, the nature and extent of his disability.

3. Claimant's entitlement to an award of Death Benefits and reimbursement of funeral expenses.

4. Decedent's entitlement to medical benefits.

5. Responsible Employer.

6. Applicability of Section 8(f) of the Act.

Post-hearing evidence has been admitted as:

<u>Exhibit No.</u>	<u>Item</u>	<u>Filing Date</u>
	Deposition Notices Filed By Claimant Relating to:	
CX 19	Arthur De Graff, M.D.	03/29/02
CX 20	Susan M. Daum, M.D.	03/29/02
CX 21	Robert Kramer	03/29/02
CX 22	Robert A. Brown	03/29/02
ALJ EX 17	This Court's ORDER establishing a post-hearing evidentiary and briefing schedule	04/01/02
CX 23	Notice Relating To The Rescheduling of the deposition of Dr. De Graff	04/08/02
CX 24	Notice Relating to the Rescheduling of the deposition of Mr. Kramer	04/17/02
RX 10	Attorney Murphy's letter filing the	04/19/02
RX 11	April 16, 2002 Supplemental Report of Peter J. Barrett, M.D.	04/19/02
CX 25	Attorney Embry's letter filing the	04/26/02
CX 26	April 12, 2002 Deposition Testimony of Dr. Daum, as well as the	04/26/02
CX 26A	Curriculum Vitae of Dr. Daum	04/26/02
CX 26B	"Some Additional References on Asbestos and Lung Cancer," by Dr. Daum	04/26/02
RX 12	Attorney Murphy's letter advising that Decedent worked for the	04/30/02

Employer from October 24, 1977
through November 17, 1981

CX 27	Attorney Olson's letter filing the	05/01/02
CX 28	Deposition Testimony given on April 4, 1978 by Bernard Guillotte (3 volumes)	05/01/02
CX 29	Notice Relating to the Deposition of Robert A. Brown	05/06/02
CX 30	Notice Rescheduling the Depositions of Mr. Kramer and Mr. Brown	05/06/02
RX 13	Attorney Murphy's letter filing the	05/09/02
RX 14	April 24, 2002 Deposition Testimony of Dr. Barrett	05/09/02
RX 15	Attorney Murphy's letter filing	06/04/02
RX 16	Data Relating to the Overhaul of Submarines by the Employer	06/04/02
RX 17	Attorney Solod's letter confirming the briefing schedule	06/20/02
CX 31	Attorney Embry's letter filing the	06/27/02
CX 32	May 16, 2002 Deposition Testimony of Robert Brown, as well as the	06/27/02
CX 33	May 16, 2002 Deposition Testimony of Robert Kramer	06/27/02
CX 34	Attorney Olson's letter filing the	07/22/02
CX 35	Parties' Joint Request For An Extension of Time to file their post-hearing briefs	07/22/02
ALJ EX 18	This Court's ORDER granting such extension	07/22/02
CX 36	Attorney Olson's letter filing the	07/22/02
CX 37	April 30, 2002 Deposition Testimony of Dr. Arthur De Graff	07/22/02
CX 38	Claimant's brief	08/02/02

The record was closed on August 5, 2002 as no further documents were filed.

Summary of the Evidence

William F. Bania ("Decedent" herein), who was born on June 23, 1943 and who received vocational training at Northrop Institute of Technology, began working on November 4, 1968 as a supervising service engineer for the Westinghouse Electric Company ("WEC" or Employer I). (CX 17) Decedent performed his assigned duties at the Groton, Connecticut shipyard of the Electric Boat Company ("EBC" or Employer II), a maritime facility adjacent to the navigable waters of the Thames River where EBC builds, repairs and overhauls submarines. Decedent left the employ of WEC and, after being out of work for a while, he began working on November 4, 1974 (or October 24, 1977 [RX 12]) as a Senior Operations Engineer for EBC at its Groton shipyard. (CX 13) Decedent left the employ of EBC in 1990 (or on November 17, 1981). (RX 12) As Decedent's testimony was not preserved by deposition, the nature and extent of his maritime employment will be resolved by an analysis of the history reports he gave to his doctors, as well as the testimony of several of his co-workers, and this testimony will be discussed below.

Decedent's medical condition and his fatal illness are best summarized in the July 25, 2001 report of Dr. Susan M. Daum, D.D., F.A.C.C.P., a Diplomat of the American Board of Internal Medicine and the American Board of Preventive Medicine (Occupational Medicine). In her report, Dr. Daum states as follows (CX 4):

"I have reviewed the records on William Bania which include: occupational history supplied by attorney, chest x-ray report dated November 19, 1999; CT scan of chest and brain of November 26, 1999; admission to The William Backus Hospital from November 30 - December 6, 1999 and a death certificate dated March 30, 2000.

"REVIEW OF MEDICAL RECORDS: On November 26, 1999, a CT scan of the chest showed a 10 x 9 cm mass in the left upper lobe area. A CT scan of the head showed two lesions one in the right thalamus, and the other in the left frontal lobe area. He had some weight loss, however he attributed that to diet. He also reported some discomfort in the left side of his chest. There was no history of hemoptysis or headache but he did report occasional dizziness. A chest x-ray on November 19, 1999 had shown a large, left hilar mass.

"The CT scan was further interpreted. It showed a large mass in the left upper lobe measuring 10 x 9 cm. The mass abutted the

aortic arch and encased the left pulmonary artery and left major bronchus. There were lymph nodes in the left hilum, subcarinal area and pretracheal retrocaval space. Abdominal CT scan showed an enlarged left adrenal gland and central necrosis consistent with metastatic disease. The liver also showed evidence of metastasis.

"The patient was admitted to William Backus Hospital November 30 - December 6, 1999. He was 56 years old and was admitted for metastatic lung carcinoma involving the brain. He was admitted for further evaluation and treatment. He had developed acute bronchitis in September of 1999 and was seen in a clinic where he was treated with antibiotics. He subsequently developed hoarseness of his voice. Endoscopy revealed left vocal cord paralysis. He had a chest x-ray which showed a left lung mass.

"Fiberoptic bronchoscopy was done on December 1, 1999. Left upper lobe carcinoma was found. The left mainstem bronchus contained normal mucosa except for slight inflammation. No endobronchial lesions were seen in the left lower lobe subsegment. The lingular segment was occluded with the mass, however. The pathology of the bronchial biopsies (S99-8851) showed findings consistent with small cell carcinoma of the intermediate cell type with neuroendocrine features. Mucin stains were negative...

"A record dated March 1, 2000, from The Norwich Cancer Center indicates that he had completed whole brain radiotherapy and four cycles of chemotherapy with Taxol, etoposide and cisplatin. Chest x-ray at the end of three cycles showed no significant change. In February, 2000 he had progressive weakness and ataxia associated with severe falling. He responded to cortisone although no metastatic disease or hematoma was found in the brain. He was also dehydrated. He was noted in March of 2000, to have a 70 pound weight loss since the original diagnosis. Much discomfort had occurred because of radiation treatments and 7 courses of chemotherapy. He refused further therapy except for comfort.

"He died on March 30, 2000 at the age of 56. The cause of death was extensive small cell carcinoma of the lung present for 3 ½ months. No autopsy was performed.

"OCCUPATIONAL HISTORY: Mr. Bania was employed by the Westinghouse Company at Electric Boat between 1968 and 1974. He also actually worked for Electric Boat between 1974 and **1990**. From 1968 through the late 1970's, he had extensive exposure to asbestos coming from the insulation and removal of asbestos materials being placed on the submarines.

"While working for the Westinghouse Company, boilers were being installed into the submarines. He spent a great deal of time working on the vessels and in the engine rooms and reactor rooms during this entire time. He was extensively exposed to asbestos coming from insulation and removal of asbestos from piping and

boilers. He was also exposed to asbestos welding blankets.

"In 1974, he left Westinghouse and went to work as an engineer and outside machinist for Electric Boat. He had some additional exposure to asbestos between 1974 and about the mid 1970's which came from asbestos that was being moved and installed onboard vessels, as well as some exposure from gasket material.

"PAST MEDICAL HISTORY:

Medical Illnesses:	Depression and alcohol abuse treated with psychiatric hospitalization in about 1991. COPD
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Surgical Illnesses and Injuries:	Left knee surgery, 1960's. Hemorrhoidectomy.
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Habits:	Cigarettes: According to Dr. Green on November 18, 1999, he smoked one pack per day and stopped in 1996 or 1997. He smoked for 20-30 years. His family reports that he smoked from 1963 until 1998 at the rate of approximately 1 ½ packs per day. William Backus Hospital records indicated that he smoked 2 packs of cigarettes a day, but had stopped in approximately 1997. History of alcohol abuse treated in psychiatric hospital in 1991 with no subsequent use since.
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<u>"REVIEW OF SUBMITTED X-RAYS:</u>	See enclosed B-reading.
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"CONCLUSION: In my opinion, Mr. Bania developed a carcinoma of the lung (bronchogenic carcinoma) which was the cause of his death. In my opinion, his occupational exposure to asbestos was a significant contribution in the development of his lung cancer.

"Asbestos is a well recognized carcinogen, causing lung and several other types of malignancies in man and animals. Typically in humans, carcinogen induced malignancies occur 20-30 years after the first exposure to the carcinogenic material (asbestos) and the period between the time of first exposure and onset of tumor is called a latency period. Specifically, shipyard exposure for short periods of employment (less than 5 years) has been associated with an increased rate of lung cancer.

"It is now well established that all types of lung cancer are increased in asbestos-exposed populations. The distribution of the types of lung cancer which occurs parallels that which occurs in the general population. The cancers do not appear any different clinically or pathologically (under the microscope) from "spontaneous" cancers arising in the general population or from those induced by other carcinogens, such as cigarettes. There is also no particular location of the cancer which rules out a contribution of asbestos-carcinogenesis to its development and/or evolution.

"There is no biologic reason asbestosis should be a necessary precursor to asbestos-related cancer, since there are different biologic mechanisms by which asbestosis causes pulmonary fibrosis and lung cancer or other cancers.

"The fibrosis caused by asbestos particles is mediated by a reaction of asbestos with inflammation cells causing the expression of cellular hormones (called cytokines). Cancers are caused by asbestos fibers acting on the genetic material in the nucleus of the cell. Asbestos has been shown to cause changes in the genetic material (chromosome and the DNA which composes chromosome). These changes are known to be the types of changes associated with the initiation and promotion of the development and increasing abnormality of cancer cells. These two processes occur with different dose-response levels, a fact recognized by the most recent asbestos-exposure standard of OSHA (1984) which lowered the permissible exposure from 1 fiber/cc TWA (to prevent asbestosis is) to 0.1 fiber/cc (to reduce the incidence of lung cancer) to 1 case/10,000 for workers exposed for 40 years.

"Case studies show that no degree of fibrosis (pathologically or radiographically visible) necessarily accompanies lung cancer from asbestos. As well, there is also no particular pattern of cancer of the surrounding lung or quantitative asbestos burden which identifies the asbestos-induced bronchogenic cancer. I also note that the demonstration of asbestos in the lung tissue is "proof" (beyond doubt) that the individual was exposed to asbestos some time in his/her life, and not at all 'proof' that the particular particles inhaled, or those seen 'caused' the cancer.

"The separate pathogenesis of pulmonary asbestosis and asbestos-associated lung cancer is confirmed by several epidemiologic studies which demonstrate that excess lung cancer occurs in asbestos-exposed populations who do not have fibrosis as measured by x-rays (Wilkinson, Loomis and Hillerdal). In Loomis, lung cancer incidence was 3 times expected in individuals with pleural plaques. These individuals were not construction workers, but worked with asbestos as bystanders or incidentally. It should be noted that pathologic asbestosis may be present in as much as 40% of x-rays which do not show interstitial fibrosis. The pulmonary function abnormalities associated with asbestosis; aveolar

capillary block and/or restrictive lung impairment are often present in exposed individuals who do not have visible interstitial abnormalities on their radiographs.

"Excess lung cancer among asbestos workers has been demonstrated in asbestos workers who smoke and in those who do not smoke. Among asbestos workers who do not smoke, the incidence of lung cancer is approximately 5 times higher than the incidence found in a population which does not smoke or work with asbestos. Among those asbestos-exposed workers who also smoke cigarettes, the incidence of lung cancer is 5-7 times in excess than that which occurs among smokers in the general population who are not exposed to asbestos, and 50-70 times that which occurs in individuals who neither smoke nor work with asbestos. As well, asbestos workers who smoke develop lung cancers and die at a younger age than non-asbestos exposed smokers with lung cancer. Thus, it is apparent that asbestos itself is a carcinogen for the lung and it interacts in a synergistic fashion (more than additive) with carcinogens in cigarette smoke.

"Thus, it is my opinion that exposure to asbestos was a significant contributing factor in the development of the lung cancer which has resulted in Mr. Bania's death.

"These opinions are expressed to a reasonable degree of medical certainty," according to Dr. Daum, who reiterated her opinions at her April 12, 2002 deposition, the transcript of which is in evidence as EX 26. Dr. Daum's opinions will be discussed further below.

Dr. Arthur C. DeGraff, Jr., a noted pulmonary expert in the State of Connecticut, sent the following letter on May 1, 2001 to Claimant's attorney (CX 5):

"Thank you for asking me to review Mr. Bania's medical records. You indicate that from 1968 through the 1970s while working at Electric Boat, first for the Westinghouse Company and then for Electric Boat, Mr. Bania had "relatively extensive" exposure to asbestos. He unfortunately developed small cell cancer and died on 03/30/00 with the cause of death being listed as 'extensive stage of small cell cancer.'

"On 11/19/99 Mr. Bania had a chest x-ray obtained which revealed a large left hilar mass with probably mediastinal metastases. At that time he was complaining of hoarseness. On 11/26 a CT examination of the chest was performed. A large mass lesion of the left upper lobe measuring 10 cm by 9 cm was described with associated enlarged lymph nodes at the left hilum and with a metastatic lesion of the left upper lobe laterally measuring 2 cm by 1 cm. Additionally the left adrenal gland was enlarged consistent with metastatic disease. Lung parenchymal window setting revealed 'generalized chronic fibroemphysematous changes

bilaterally with multiple tiny bulli formation at the periphery of both lung fields.' No pleural effusion or pleural thickening was noted. The 'fibroemphysematous changes' with tiny peripheral bulli at the periphery of both lung field could be the result of pulmonary fibrosis caused by asbestosis. CT of the brain was consistent with metastatic disease to the brain. On 11/30 admission history at William Backus Hospital by Dr. Kabadi indicates hoarseness of voice and left vocal cord paralysis and the above findings on chest x-ray and CT of chest.

"Past medical history indicates that Mr. Bania was a smoker of two packs of cigarettes a day for an unknown period of time, stopping smoking two years before being seen in 1999. There was also a history of alcohol abuse in the past but not for the past eight years. Mr. Bania was seen in consultation by Dr. Kamireddy. The reason for consultation was that the "patient has brain mets and left lung mass." Fiberoptic bronchoscopy was performed by Dr. Kamireddy and biopsies from washings obtained. Microscopic examination of biopsy material revealed extensive infiltration by malignant epithelial cells of small cell type. Bronchial washings failed to reveal evidence of neoplasm.

"Mr. Bania was then seen by Dr. Kacinski of the radiation therapy department of Backus Hospital. Dr. Kacinski indicated a plan to treat the brain metastases with a dose of 3000 cGy. Abdominal CT was also obtained at the time showing metastatic disease to spleen and left adrenal gland and possibly to the mesentery. X-ray of the esophagus was obtained. A large mediastinal mass causing extrinsic narrowing of the esophagus was noted. The patient was then discharged for outpatient management. He died nine days after discharge as a consequence of extensive carcinomatosis.

"At the time of his death Mr. Bania had extensive metastatic small cell carcinoma involving multiple organs of his body. I understand from your letter that he had significant asbestos exposure. Although at the time of workup shortly prior to his death the primary concern was in diagnosing and determining the extent of carcinoma, on CT scan evaluation the radiologist describes changes which are consistent with diagnosis of pulmonary fibrosis and asbestosis. These changes support the asbestos exposure history which you obtained. In addition to being exposed to asbestos, Mr. Bania was also a smoker. As I have indicated to you in the past, there is ample evidence that lung tissue exposed to asbestos particles can and does develop genetic mutations predisposing the tissue to development of cancer. There is also ample evidence through population studies that persons who through their occupation are exposed to asbestos carry an increased risk of developing lung cancer as compared to similar populations that are not exposed to asbestos. Thus while cigarette smoking confers an approximate 5-10 times increase in development of lung cancer among smokers as opposed to non-smokers, persons who work in occupations where they have been routinely exposed to asbestos fibers have an

additional 5-fold increase in the risk of developing lung cancer. This 5-fold increase in risk of developing lung cancer is a multiplier factor, not additive. Thus a cigarette smoker who has a 10-fold increase in the incidence of lung cancer as compared to the non-smoker, if that cigarette smoker is also exposed to occupational asbestos dust, that worker will have a 50-fold increase in risk of developing lung cancer as compared to a population of non-smokers.

"Therefore it is my opinion that Mr. Bania's lung cancer developed as a direct consequence of his exposure to asbestos while working at Electric Boat for Westinghouse and for Electric Boat. It is further my opinion that Mr. Bania died as a consequence of his lung cancer and its extensive metastases. Therefore Mr. Bania's death occurred as a consequence of his occupational asbestos exposure." according to the doctor.

Dr. De Graff reiterated his opinions at his April 30, 2002 deposition, the transcript of which is in evidence as CX 37, and the doctor's opinions will be further discussed below.

Decedent's medical condition is also summarized in the March 3, 2000 **DISCHARGE SUMMARY** of Dr. Dennis Slater of The William W. Bachus Hospital (CX 6):

"The patient is a 56 year old white male with extensive stage small cell lung carcinoma involving the brain, liver, and left adrenal gland, status post WBRT and currently receiving PET chemotherapy admitted for orthostatic dizziness, hypotension, and dehydration.

"The history or present illness and admission physical examination on the submitted office note and handwritten admission note ...

"SUMMARY OF IMAGING STUDIES

None.

"HOSPITAL COURSE

The patient complained of serial orthostatic dizziness for several weeks, and vital signs documented striking orthostatic hypotension. The orthostatic changes were attributed to autonomic neuropathy associated with PET chemotherapy and possible adrenal insufficiency. Serum cortisone levels, however, were not consistent with hypoadrenalism. The patient was treated with Fluorine and Hydrocortisone, but this failed to correct the orthostatic changes. DDAVP was later added and yielded some improvement in the dizziness, according to his wife. He was hospitalized because of dehydration causing worsened orthostatic dizziness. He was treated with aggressive IV fluids between 3-4 liters per day. Orthostatic blood pressures showed drop in the systolic BP to 60-80 when standing on admission, and this did not

consistently improve during the hospital stay. However, on the day of discharge the blood pressure when standing was 150/62, suggesting some improvement with IV hydration. He was continued on Fluorine and steroids, the latter Prednisone 7.5 mg. bid. Hypokalemia was corrected with intravenous and oral potassium supplements. Megace suspension 400 mg. bid was prescribed as an appetite stimulant. He was continued on other routine medications including Pepcid, Allopurinol, and Albuterol. On the day of discharge he had no localizing symptoms, but still perceived mild dizziness upon standing. He specifically denied any headache, blurred vision, diplopia, tinnitus, vertigo, or nausea.

Lab on the day of discharge: Sodium 142, potassium 3.4, chloride 106, CO2 25.

"CONDITION ON DISCHARGE
Guarded.

"DISCHARGE MEDICATIONS

Fluorine increased to 0.2 mg. qd, Pepcid 20 mg. bid, Allopurinol 100 mg. qd, Albuterol 2 puffs qid, Prednisone 7.5 mg. bid, K-Dur 20 mEq tid, Megace 400 mg. bid, Tylenol #3 1 q6h prn.

"DISCHARGE DIAGNOSIS

1. Extensive stage small cell lung carcinoma involving the brain, liver, and left adrenal gland. Ongoing treatment with PET chemotherapy.
2. Severe orthostatic hypotension. Autonomic neuropathy secondary to chemotherapy. ? paraneoplastic syndrome. Increase Fluorine dose and continue Prednisone and potassium supplements. Doubt hypoadrenalism.
3. Vocal cord paralysis secondary to #1.
4. Reactive depression.
5. Dehydration exacerbating with orthostatic hypotension and dizziness.
6. Hypokalemia secondary to steroids," according to Dr. Slater.

There is also a **DISCHARGE SUMMARY** of January 23, 2000 authored by Dr. Slater wherein the doctor concludes as follows (CX 6 at 5-6):

"DISCHARGE DIAGNOSES:

1. Extensive stage small cell lung carcinoma involving the brain,

mediastinum, adrenal gland and liver. Cycle three PET chemotherapy.

2. Brain metastasis involving the right thalamus and left frontal lobe status post brain radiation.
3. Dysphagia secondary to extrinsic pressure by bulky mediastinal tumor.
4. Hoarseness secondary to presumed laryngeal nerve paralysis.
5. Hypomagnesemia associated with cisplatin chemotherapy," according to the doctor.

The record also contains the November 30, 1999 **History and Physical** relating to Decedent's admission to the William W. Bachus Hospital wherein Dr. M. Kabodi states as follows (CX 6 at 11-14):

"PAST MEDICAL HISTORY

Remarkable for history of alcohol abuse and depression in the past for which he was treated in one of the psych hospitals about eight years ago, but claims since then he has been free of alcohol use. He has been a smoker in the past and smoked about 2 packs cigarettes a day but stopped about two years ago. No known history of hypertension, heart disease, diabetes mellitus, chronic cough or asthma. He denies any chronic abdominal pain, peptic ulcer disease, or significant urinary or bowel disturbances. He has had surgery for hemorrhoids in the remote past and also had tonsillectomy as a child.

"PERSONAL HISTORY

He smoked two packs cigarettes a day until about two years ago. History of alcohol abuse in the past but not for the last 8 years.

"ALLERGIES

No known drug allergies.

"FAMILY HISTORY

He claims his father died of aplastic anemia when he was 55 years old. His mother is living, about 81 years old. Some of his aunts and grandparents had diabetes mellitus.

"PHYSICAL EXAMINATION

Clinical exam at this time revealed a middle-aged white male patient.

"HEENT: Normocephalic. No icterus. Mild pallor. Pupils and

fundi are normal. Throat and oral cavity normal but his voice is hoarse. No nasal congestion. No facial tenderness or asymmetry. Ears appear normal...

"ADMISSION DIAGNOSIS

1. Carcinoma of lung with metastasis to brain.
2. Mild COPD.
3. History of left vocal cord paralysis and hoarseness of voice.

"PLAN

Obtain routine chemistries. Arrangement for bronchoscopy and consult Dr. Nagireddy Kamireddy for that. Obtain CT scan of abdomen. Oncology consult with Dr. Kandhasamy Jagathambal. Will place him on Dilantin and Decadron and await tissue diagnosis...

"PERSONAL HISTORY

Patient is married, has one son. No alcohol or drug abuse. Patient used to smoke about 2-3 packs per day, quit two years ago. Patient used to drink, quit about 6-7 years ago.

Patient worked at EB for 27years as an engineer. He was around the asbestos but no definite contact with asbestos...

"ASSESSMENT

1. Left upper lobe lung mass with lymph node involvement in the mediastinum, probably primary lung carcinoma.
2. Brain mets.
3. History of asbestos exposure.
4. Mild COPD secondary to his smoking.

"PLAN

1. I have discussed with him and explained that he needs a bronchoscopy and he agreed and signed the permit.
2. He is scheduled to have a bronchoscopy tomorrow.
3. Meanwhile continue the Decadron which is already ordered.
4. Probably need radiation therapy to the brain.
5. I also explained to him about the adverse affects of the bronchoscopy including mild bleeding and pneumothorax and he

understands the complications.

6. NOP after midnight.

Thank you very much for asking me to see this patient and will follow with you," according to the doctor.

Decedent's lung cancer was diagnosed by Dr. Robert S. Bell on November 19, 1999 and the doctor's report is in evidence as CX 8 at 38.

EBC has offered the December 2, 1999 report of Dr. Sultan Ahamed of the Radiation Therapy Center in nearby Norwich where the doctor states as follows (RX 6):

"Social History: History of asbestos exposure. He is married and has one son. The patient used to smoke about 2-3 packs of cigarettes per day but quit two years ago. He used to drink alcohol as well but quit about nine years ago. The patient worked for Electric Boat for 27 years as an engineer.

"Family History: Father with a history of aplastic anemia.

"Current Medications: Decadron 6 mg IV q.6 hours, Dilantin 100 mg q. 8 hours, Anzemet, Pepcid, Compazine, codeine, Percocet and Albuterol...

Extremities: There was no cyanosis, clubbing or edema.

Neuro: There were no focal neurologic deficits.

"Assessment/Plan: Mr. Bania is a 56-year-old man recently diagnosed with what appears to be metastatic lung carcinoma. His pathology report is still pending but is consistent with a lung primary. Obviously the histology will be of significant importance as to the choice of chemotherapy which Dr. Jaga has recommended. He is significantly hoarse and does have dyspnea on exertion. He also admitted to some occasional headaches and dizziness. His imaging reveals evidence of metastatic disease to his brain, lung, mediastinal, periaortic region, pelvic lymph nodes, and left adrenal gland. We have recommended a course of palliative EBRT to his brain at this time. The goal of whole brain radiation therapy is to improve local control, overall survival and to palliate his symptoms. The risks and benefits of whole brain radiation therapy were discussed with the patient at length. The risks discussed included but were not limited to fatigue, skin irritation, alopecia, cerebritis, and potentially long term decreased cognitive function. Our plan is to treat his brain to a dose of 3,000 cGy in 10 fractions. We are also planning on scheduling him for simulation for a mediastinal field on Monday. The goal of EBRT to his mediastinum is to prevent ultimate pulmonary deterioration as well as to palliate his hoarseness and dyspnea on exertion. The

risks discussed included but were not limited to fatigue, skin irritation, esophagitis and pneumonitis. The patient was willing to proceed with this treatment course. We will coordinate this patient's care with Dr. Jaga," according to the doctor.

EBC has also offered the January 11, 2002 report of Dr. Peter J. Barrett wherein the doctor states as follows (RX 9):

"I received clinical data on Mr. Bania, and I will summarize below my review of that material.

"The clinical data begins in 1999, at which time Mr. Bania was found to have shortness of breath and hoarseness. On further evaluation, a large mass lesion in the left upper lobe was detected. By chest x-ray and CT scan there was a 10-cm x 9-cm mass in the left upper lobe with a peripheral mass lesion in the left upper lobe adjacent to the primary mass as well as evidence of metastatic disease to his brain and to his adrenal primary mass as well as evidence of metastatic disease to his brain and to his adrenal glands. On biopsy and pathologic review this proved to be a small-cell carcinoma of the lung. Abdominal CT scans confirmed the metastatic disease to the left adrenal gland and possibly to the mesentery as well as to his spleen. All of the chest x-ray and CT scan reports, the clinical data, and the pathologic reports found nothing which was consistent with asbestosis or with significant prior asbestos exposure. Only chronic emphysema with associated scarring and chronic obstructive lung disease were noted. On auscultation there was "wheezing" present, but there were no rales heard. The records do note that he was a heavy smoker of two packs of cigarettes per day through 1997. He is stated to have worked at Westinghouse and for Electric Boat from the late 1960s through the early 1990s.

"He was treated aggressively with chemotherapy and radiotherapy and initially had some improvement, but his primary tumor led to his demise on March 30, 2000. Retrospective reviews have outlined the data that I have above. One "B" reading found clearly that there was nothing to suggest asbestosis or significant prior asbestos exposure. One other physician raised the question of the description by CT of fibro-emphysematous changes possibly being related to asbestos exposure. There is certainly nothing in the medical literature which indicates that hyperinflation, chronic lung disease, and bullous formation could be caused by exposure to asbestos fiber. There is no description of pleural plaques, small parenchymal opacities, or any other findings clinically, pathologically, or radiographically.

"The clinical records indicate that Mr. Bania was a heavy smoker of two packs of cigarettes per day for at least 30 years through 1997. He worked for Electric Boat, where he had potential exposure to asbestos fiber. He developed a lung cancer in 1999 which progressed aggressively to involve metastatic disease of his lung,

brain, spleen, and at least one adrenal gland. This led to his demise on March 30, 2000. There were no rales heard on auscultation, and none of the treating radiologists or pathologists reported findings consistent with either asbestosis or significant prior asbestos exposure.

"It is my opinion, to a reasonable degree of medical certainty, that in the absence of parenchymal asbestosis Mr. Bania's lung cancer is clearly secondary to his heavy cigarette habit and has no relationship to prior exposure to asbestos fiber. There is no evidence in the available data that any type of workplace exposure contributed to any of Mr. Bania's diseases," according to the doctor.

In his April 16, 2002 supplemental report, Dr. Barrett stated as follows (RX 11):

"The CT scans on Mr. Bania from January 18, 2000, are available, and I will comment on these below.

"This chest CT shows the presence of a large, extensive primary carcinoma of the lung involving both paramediastinal and paratracheal regions with extensive involvement and metastatic disease to the mediastinal lymph nodes. There is also metastatic disease to Mr. Bania's left adrenal gland and to his spleen. There is as well evidence of chronic obstructive lung disease, hyperinflation, and bullous formation, indicative of advanced chronic obstructive airways disease. There are no small parenchymal opacities or any of the computer tomographic "hallmarks" which are seen in cases of asbestosis, nor are there any pleural plaques.

"In conclusion, by review of these chest CT scans it is clear that Mr. Bania has an extensive and aggressive neoplastic process which metastasizes to his mediastinum, left adrenal gland, and spleen, and it was diagnosed as being a non-small cell carcinoma of the lung. He also has extensive chronic obstructive lung disease and bullous formation due to his heavy cigarette smoking habit, but he has nothing to suggest asbestosis or significant prior asbestos exposure.

"It remains my opinion, to a reasonable degree of medical certainty, that in the absence of parenchymal asbestosis Mr. Bania's lung cancer is secondary to his heavy cigarette smoking habit and has no relationship to prior exposure to asbestos fiber."

Dr. Barrett reiterated his opinions at his April 24, 2002 deposition, the transcript of which is in evidence as RX 14, and the doctor's opinions will be further discussed below.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of credible

witnesses, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, *supra*, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989);

Trask v. Lockheed Shipbuilding and Construction Company, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita, supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier, supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See, e.g., Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See, e.g., Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

EBC contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is

substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on the statements of Claimant and Decedent's co-workers to establish that the Decedent experienced a work-related harm, and as it is undisputed that working conditions existed which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See, e.g., Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged harm and the maritime employment. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which negates the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied**, 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As EBC disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to EBC to rebut the presumption with substantial evidence which establishes that Decedent's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied**, 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland**, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The probative testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999), **cert. denied**, 120 S.Ct. 40 (1999).

In the case **sub judice**, Claimant alleges that the harm to her husband's bodily frame, **i.e.**, his asbestos-related lung cancer, resulted from his exposure to and inhalation of asbestos and other injurious pulmonary stimuli at the EBC shipyard. The Employer has not introduced substantial evidence severing the connection between such harm and Claimant's maritime employment, as shall be further discussed below. In this regard, **see Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989). Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be

discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos, supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time.

The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

Mr. William F. Bania ("Decedent" herein) had a long history of exposure to asbestos, welding fumes and grinding dust while employed with WEC and EBC at the Electric Boat Shipyard, Groton, CT from 1968 to 1990. Decedent worked on board submarines that were being dismantled, repaired and refitted during the overhaul process. While he worked all over the boats, he was primarily in the reactor and engine rooms. A listing of the submarines overhauled at the Groton shipyard is in evidence as RX 16.

Mr. Richard F. Ipsen worked with Mr. Bania from approximately 1968-1974. Mr. Ipsen stated that while he and Mr. Bania were working, ladders were applying asbestos to pipes surrounding them in the confined areas on board the submarines. (TR 86-98)

Mr. William Fagan worked with the Decedent on submarine overhauls in the reactor rooms from the late 1970's into the 1980's. The boats they worked on were at least ten years old and were built by EBC. Their duties included repairing and overhauling mechanical components attached to steam generators, pumps, and valves. The overhaul process began with the ladders ripping the asbestos insulation from the components and the hundreds of steam pipes. Decedent and Mr. Fagan were in the reactor room and were working next to the ladders as they ripped off the asbestos lagging, a process that released clouds of asbestos dust into the air. Mr. Fagan described the atmosphere as resembling a snowstorm. (TR 36-61)

Mr. Lester J. Smith worked closely with Decedent in the late 1970's into the 1980's. Mr. Smith and Decedent were on the submarines on a daily basis as they worked with the engine and reactor room crews who were dismantling, repairing and overhauling the steam propulsion systems. These were among the first submarines built in the 1960's and were heavily contaminated with asbestos. (TR 61-85)

Mr. Smith also recalled that the overhaul process began with ladders cutting away asbestos insulation from the pipes and other insulation which caused clouds of asbestos dust to be released into the air. (TR 61-86)

Mr. Smith recalled that the decks of the submarines were covered with asbestos dust. He and Decedent worked in the engine and reactor rooms while the asbestos debris that had been ripped off was removed. Cleaners came through with shovels and brooms to sweep up the dust and debris, a process that also caused asbestos dust to fill the air. (TR 61-86)

Mr. Charles V. Knapp worked with Decedent in the 1980's during the overhaul process. Mr. Knapp recalled that Decedent solved problems for Department 242 on overhaul boats and did considerable work on the steam turbine generators in the engine rooms. The turbines were covered with massive asbestos blankets which had to be removed for the repair work to be done. The ladders cut away the asbestos blankets releasing dust in the air and causing the air to appear snowy and hazy. Mr. Knapp and Decedent were present in the engine rooms during these removal processes. (TR 96-118)

Mr. Robert Kramer worked alongside Decedent on board submarines that were being refitted, repaired and overhauled. Mr. Kramer recalled that the work they did was dusty, dirty work and that submarine construction was a messy job. Mr. Kramer confirmed that the ladders were cutting asbestos lagging from pipes and turbines which caused dust to be released into the air. The cleaners swept up the debris, and he and Decedent were exposed to and inhaled the dust. Mr. Kramer also recalled that he and Decedent worked alongside the welders and grinders who were working on board the boats. The grinding process involved grinding wheels which leveled welds and cut metal. During the process of grinding, the wheels broke down and produced dust. The welders were welding different types of metal including galvanized and stainless steel as well as CRES, nickel and copper piping. (CX 33)

Mr. Kramer, who also worked with Decedent in the Foundry Building, recalled significant amounts of asbestos dust in the building to which he and Decedent were exposed. Asbestos was used in the foundry for a variety of purposes, from insulating the plates used in the foundry ovens to insulating the pipes in the building. Mr. Kramer recalled that the dust in the air actually clogged the air conditioning filters, forcing them to change the filters twice a day. The building itself was made of asbestos, and in 1995, the building was torn down causing significant asbestos abatement problems and concerns. Mr. Kramer was first employed at EBC from 1963-1967 as an outside machinist and worked on the submarines on a daily basis. He indicated that there was heavy exposure to asbestos including exposure to Westinghouse materials. (CX 33)

Mr. Robert Brown was a foundry worker and worked in the same building as the Decedent and Mr. Kramer. He indicated that one hundred or more asbestos plates were used in the foundry for molding and heating purposes. In addition, the foundry workers wore asbestos gloves. The pipes in the foundry building were insulated with asbestos and the building was made of asbestos. Mr. Brown testified that when the building was torn down in the late 1900's, it was completely encapsulated in plastic wrap and huge signs were placed around the area, warning people that the building contained asbestos. Mr. Brown also testified that there was significant exposure to other dusts in the foundry including silica. (CX 32)

I note that the Employer has offered no testimony - either from a supervisor or co-worker - contradicting this probative testimony that Decedent was, in fact, exposed to and inhaled asbestos dust and fibers.

Claimant has also offered substantial medical evidence in support of the claims before me, and this evidence will now be summarized.

Dr. Susan M. Daum, an environmental and occupational medicine specialist, concluded that Decedent's exposure to asbestos was a significant contributing factor in the development of his carcinoma of the lung (bronchogenic carcinoma) and his death. (CX 4)

Based on her expertise in the area of asbestos-related diseases and her extensive knowledge of the scientific and medical literature, Dr. Daum testified that there is no biological reason that asbestosis should be a necessary precursor to asbestos-related cancer since there are different biological mechanisms by which asbestos causes pulmonary fibrosis and lung or other cancers. Moreover, while asbestosis or scarring of the lungs occurs primarily in the lower and mid-lung fields, asbestos-related lung cancers occur in the upper fields as well and are consistent with the distribution of all kinds of lung cancers. This fact is significant in the sense that if the tumor is not in an area where there is scarring, it is not likely to be related to the process of scarring. While there may be a contributory phenomenon of scarring in some cancers, it is only a mechanism not a necessary precursor. (CX 26 at 18-19)

Dr. Daum also concluded that Decedent's exposure to asbestos contributed synergistically with his exposure to cigarette smoke to cause his lung cancer. Decedent was a cigarette smoker for approximately 20-30 years, quitting in 1998. He smoked approximately 1.5 - 2 packs per day as testified to by Mrs. Bania. Cigarette smoke and asbestos interact on the chromosomal level to cause a malignant cell to develop. (CX 26 at 26) Workers who are exposed to asbestos but do not smoke are 5 times more likely to develop lung cancer than the general non-smoking, non-asbestos exposed population. Workers who are exposed to asbestos and cigarette smoke were found to have an incidence of lung cancer of 5-7 times in excess of that which occurs among non-asbestos exposed cigarette smokers and 50-70 times in excess of that which occurs in individuals who neither smoke nor suffer exposure to asbestos. **It is apparent, therefore, that asbestos itself is a carcinogen for the lung and acts synergistically with carcinogens in cigarette smoke.** (CX 4) (Emphases added)

I note that Dr. Daum reiterated her well reasoned and well documented opinions at her post-hearing deposition (CX 26) and her forthright opinions did not waver in face of cross-examination by EBC's counsel.

Dr. Arthur DeGraff, a noted pulmonary specialist, also concluded that Decedent's lung cancer and death occurred as a consequence of his occupational exposure to and inhalation of asbestos dust and fibers.

Dr. DeGraff confirmed that the synergistic effect of cigarette smoke and asbestos can and does develop genetic mutations, predisposing the tissue to the development of cancer. (CX 5)

Dr. DeGraff opined that it is not necessary for a person to have pulmonary fibrosis in the lung which shows up as an ILO reading of 1/1 on chest x-ray in order for a determination to be made that exposure to asbestos was a contributing factor in the development of lung cancer. Dr. DeGraff stated that a routine chest x-ray will frequently miss pulmonary fibrosis and even a CT scan will on occasion miss the pulmonary fibrosis.

Dr. De Graff reiterated his well reasoned and well documented opinions at his post-hearing deposition, the transcript of which is in evidence as CX 37, and I note that the doctor's opinions did not waver in the face of cross-examination by Employer's counsel.

The Employer has offered the opinions of Dr. Peter Barrett on its behalf. Dr. Barrett, a radiologist, confirmed that Decedent suffered from lung cancer but opined that his exposure to asbestos was not significant enough to have caused or contributed to his lung cancer and death because neither interstitial fibrosis nor pleural plaques were detected. Dr. Barrett admitted, however, that asbestos-related cancers do occur in individuals who do not demonstrate pleural plaques radiographically, and that while a majority of individuals suffering from asbestos-related cancers will demonstrate pleural plaques, interstitial fibrosis and a positive chest x-ray, it is scientifically possible that a person who has a negative chest x-ray can, in fact, suffer from an asbestos-related cancer. Dr. Barrett's reports and deposition testimony are in evidence as RX 9, RX 11, RX 14.

The issue now before me is whether Decedent's death was hastened or contributed to by his exposures to asbestos, welding fumes and grinding dust at work.

Initially, I note that there is no significant doubt that Decedent suffered from lung cancer and that the lung cancer contributed to his death. There is also no significant doubt that he was exposed to asbestos and other lung irritants during the course of his employment with Electric Boat and Westinghouse Electric at the Groton, Connecticut shipyard.

The basic issue, then, is whether the exposures to asbestos, welding fumes, and grinding dust over the years at Electric Boat had the effect of causing or hastening Decedent's lung cancer and resulting death.

As already noted above, EBC has not rebutted the statutory presumption in Claimant's favor, and I so find and conclude, as even Dr. Barrett acknowledged the well-recognized medical concept relating to the synergistic effect between cigarette smoking, the exposure to asbestos and the development of lung cancer.

However, if reviewing authorities should hold, as a matter of law, that EBC has rebutted the Section 20(a) presumption, I would still find and conclude that the Claimant has carried her burden of persuasion on the basis of the substantial evidence offered by her in support of the claims before me for the following reasons.

This Administrative Law Judge, having weighed and evaluated all of the evidence, finds and concludes that Decedent was exposed to asbestos and other injurious materials on a daily basis from the mid-1970s until at least the early 1980's. The undisputed testimony of his co-workers is that Decedent was regularly exposed to friable asbestos that was being ripped off by the ladders and swept up by the cleaners during the overhaul and repair processes on board the submarines. Decedent was also exposed to welding fumes and grinding dust on board the submarines. He worked in the Foundry Building which was very dusty and dirty and had significant amounts of asbestos imbedded in the building itself and in use in the foundry.

Dr. Daum, a well-known expert in environmental and occupational medicine, testified that Decedent was exposed to the carcinogens of asbestos and cigarette smoke and that the two carcinogens acted synergistically to cause Decedent's lung cancer and his death. In addition, Dr. Daum asserted that asbestosis is not a necessary precursor to the development of asbestos-related lung cancers because asbestos-related lung cancers occur throughout the entire lung while scarring occurs in the lower and mid lobes. If asbestos-related lung cancers occurred only from scarring or if scarring was a necessary precursor, there would not be an increased incidence of asbestos-related lung cancers throughout the lung. Dr. Daum also noted that pathologic asbestos may be present in as many as 40% of the cases in which the x-rays do not show interstitial fibrosis. The pulmonary function abnormalities associated with asbestosis, alveolar capillary block and/or restrictive lung impairment, are often present in exposed individuals who do not have visible interstitial abnormalities on x-ray, and I so find and conclude.

Likewise, Dr. De Graff concluded that it is not necessary for a person to have a ILO reading of 1/1 on chest x-ray to make a determination that asbestos was contributing factor in the development of lung cancer. Radiological studies will miss the detection of pulmonary fibrosis, therefore, negative x-ray and CT scan studies do not rule out the presence of pulmonary fibrosis nor do they rule out asbestos exposure. That Dr. De Graff misstated the date of Decedent's death in his May 1, 2001 report (CX 5) is no

reason to reject the doctor's well-reasoned and well-documented opinions, and I so find and conclude.

The sole contrary opinion is that of Dr. Barrett and I find and conclude that the doctor does not refute the conclusions of Dr. Daum or Dr. De Graff. Dr. Barrett claimed that because the chest x-rays did not reveal pleural plaques or asbestosis, Decedent did not have significant exposure to asbestos, and therefore Decedent's lung cancer could not be the result of his occupational exposure to asbestos, welding fumes or grinding dust. On cross-examination, however, Dr. Barrett admitted that it is scientifically possible that a person who has a negative chest x-ray can, in fact, suffer from an asbestos-related cancer. Dr. Barrett also admitted that exposure to asbestos fibers alone can cause asbestos-related cancer, and I so find and conclude.

As already noted, Dr. Barrett, in response to intense cross-examination, Dr. Barrett also agreed with Dr. Daum and Dr. De Graff that cigarette smoke acts synergistically with asbestos dust and fibers in the lungs to produce more than simply an additive effect in the development of lung cancer. The combination of cigarette smoke and asbestos causes more harm in an individual than in an individual who has exposure to only one of these carcinogens, and I so find and conclude.

Accordingly, in view of the foregoing, I find and conclude that there is absolutely no doubt that Decedent suffered considerable exposure to asbestos and other lung irritants during his employment at the Groton, Connecticut shipyard while working for WEC and for EBC. There is also no doubt that he developed lung cancer and that the lung cancer was a contributing factor in his death at age 56. Asbestos is a well-known carcinogen, as is cigarette smoke to which Decedent was also exposed. It is also widely accepted that these two carcinogens act synergistically to create more risk and harm than when alone. Asbestos-related cancers occur in areas of the lungs where fibrosis or scarring are not present; therefore scarring is not a necessary precursor to the development of asbestos-related lung cancer.

Thus, I find and conclude that Decedent's lung cancer arose out of and in the course of his maritime employment and hastened and caused his death on March 30, 2000. The date of Decedent's injury is November 19, 1999, at which time his chest x-rays showed the presence of the lung cancer. In this regard, **see** CX 8 at 38.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S.

962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (*Id.* at 1266)

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The 1984 Amendments to the Longshore Act apply in a new set of rules in occupational disease cases where the time of injury (*i.e.*, becomes manifest) occurs after claimant has retired. **See Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985); 33 U.S.C. §§902(10), 908(c)(23), 910(d)(2). In such cases, disability is defined under Section 2(10) not in terms of loss of earning capacity, but rather in terms of the degree of physical impairment as determined under the guidelines promulgated by the American Medical Association. An employee cannot receive total disability benefits under these provisions, but can only receive a permanent partial disability award based upon the degree of physical impairment. **See** 33 U.S.C. §908(c)(23); 20 C.F.R. §702.601(b). The Board has held that, in appropriate circumstances, Section 8(c)(23) allows for a permanent partial impairment award based on a one hundred (100) percent physical impairment. **Donnell v. Bath Iron Works Corporation**, 22 BRBS 136 (1989). Further, where the injury occurs more than one year after retirement, the average weekly wage is based on the National Average Weekly Wage as of the date of awareness rather than any actual wages received by the employee. **See** 33 U.S.C. §910(c)(2)(B); **Taddeo v. Bethlehem Steel Corp.**, 22 BRBS 52 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 46 (1989). Thus, it is apparent that Congress, by the 1984 Amendments, intended to expand the category of claimants entitled to receive compensation to include voluntary retirees.

However, in the case at bar, Decedent may be an involuntary retiree if he left the workforce because of work-related pulmonary

problems. Thus, an employee who involuntarily withdraws from the workforce due to an occupational disability may be entitled to total disability benefits although the awareness of the relationship between disability and employment did not become manifest until after the involuntary retirement. In such cases, the average weekly wage is computed under 33 U.S.C. §910(C) to reflect earnings prior to the onset of disability rather than earnings at the later time of awareness. **MacDonald v. Bethlehem Steel Corp.**, 18 BRBS 181, 183 and 184 (1986). Compare **LaFaille v. General Dynamics Corp.**, 18 BRBS 882 (1986), **rev'd in relevant part sub nom. LaFaille v. Benefits Review Board**, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989).

Thus, where disability commences on the date of involuntary withdrawal from the workforce, Decedent's average weekly wage should reflect wages prior to the date of such withdrawal under Section 10(c), rather than the National Average Weekly Wage under Section 10(d)(2)(B).

However, if the employee retires due to a non-occupational disability prior to manifestation, then he is a voluntary retiree and is subject to the post-retirement provisions. In **Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985), the Benefits Review Board applied the post-retirement provisions because the employee retired due to disabling non-work-related heart disease prior to the manifestation of work-related asbestosis.

In the case at bar Decedent is a voluntary retiree as he stopped working in 1981 (RX 12) (or in 1990) and as his work-related injury became manifest on November 19, 1999.

Thus, the benefits awarded to Decedent's estate and to Claimant shall be based upon the National Average Weekly Wage as of October 1, 1999, or \$450.64.

The Board has held that an irreversible medical condition is permanent **per se**. **Drake v. General Dynamics Corp.**, 11 BRBS 288 (1979). Lung cancer, in my judgment, is such a medical condition and entitles Decedent's estate to an award of benefits for his one-hundred (100%) permanent partial impairment, pursuant to the **AMA Guidelines For the Evaluation of Permanent Impairment**. In this regard, see **Donnell v. Bath Iron Works Corporation**, 22 BRBS 136 (1989).

Death Benefits and Funeral Expenses Under Section 9

Pursuant to the 1984 Amendments to the Act, Section 9 provides Death Benefits to certain survivors and dependents if a work-related injury causes an employee's death. This provision applies with respect to any death occurring after the enactment date of the

Amendments, September 28, 1984. 98 Stat. 1655. The provision that Death Benefits are payable only for deaths due to employment injuries is the same as in effect prior to the 1972 Amendments. The carrier at risk at the time of decedent's injury, not at the time of death, is responsible for payment of Death Benefits. **Spence v. Terminal Shipping Co.**, 7 BRBS 128 (1977), **aff'd sub nom. Pennsylvania National Mutual Casualty Insurance Co. v. Spence**, 591 F.2d 985, 9 BRBS 714 (4th Cir. 1979), **cert. denied**, 444 U.S. 963 (1975); **Marshall v. Looney's Sheet Metal Shop**, 10 BRBS 728 (1978), **aff'd sub nom. Travelers Insurance Co. v. Marshall**, 634 F.2d 843, 12 BRBS 922 (5th Cir. 1981).

A separate Section 9 claim must be filed in order to receive benefits under Section 9. **Almeida v. General Dynamics Corp.**, 12 BRBS 901 (1980). This Section 9 claim must comply with Section 13. See **Wilson v. Vecco Concrete Construction Co.**, 16 BRBS 22 (1983); **Stark v. Bethlehem Steel Corp.**, 6 BRBS 600 (1977). Section 9(a) provides for reasonable funeral expenses not exceeding \$3,000. 33 U.S.C.A. §909(a) (West 1986). Prior to the 1984 Amendments, this amount was \$1,000. This subsection contemplates that payment is to be made to the person or business providing funeral services or as reimbursement for payment for such services, and payment is limited to the actual expenses incurred up to \$3,000. Claimant is entitled to appropriate interest on funeral benefits untimely paid. **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 84 (1989).

Section 9(b) which provides the formula for computing Death Benefits for surviving spouses and children of Decedents must be read in conjunction with Section 9(e) which provides minimum benefits. **Dunn v. Equitable Equipment Co.**, 8 BRBS 18 (1978); **Lombardo v. Moore-McCormack Lines, Inc.**, 6 BRBS 361 (1977); **Gray v. Ferrary Marine Repairs**, 5 BRBS 532 (1977).

Section 9(e), as amended in 1984, provides a maximum and minimum death benefit level. Prior to the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, the average weekly wage of Decedent could not be greater than \$105 nor less than \$27, but total weekly compensation could not exceed Decedent's weekly wages. Under the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, Decedent's average weekly wage shall not be less than the National Average Weekly Wage under Section 6(b), but that the weekly death benefits shall not exceed decedent's actual average weekly wage. See **Dennis v. Detroit Harbor Terminals**, 18 BRBS 250 (1986), **aff'd sub nom. Director, OWCP v. Detroit Harbor Terminals, Inc.**, 850 F.2d 283 21 BRBS 85 (CRT) (6th Cir. 1988); **Dunn, supra**; **Lombardo, supra**; **Gray, supra**.

In **Director, OWCP v. Rasmussen**, 440 U.S. 29, 9 BRBS 954 (1979), **aff'g** 567 F.2d 1385, 7 BRBS 403 (9th Cir. 1978), **aff'g sub nom. Rasmussen v. GEO Control, Inc.**, 1 BRBS 378 (1975), the Supreme Court held that the maximum benefit level of Section 6(b)(1) did

not apply to Death Benefits, as the deletion of a maximum level in the 1972 Amendment was not inadvertent. The Court affirmed an award of \$532 per week, two-thirds of the employee's \$798 average weekly wage.

However, the 1984 amendments have reinstated that maximum limitation and Section 9(e) currently provides that average weekly wage shall not be less than the National Average Weekly Wage, but benefits may not exceed the lesser of the average weekly wage of Decedent or the benefits under Section 6(b)(1).

In view of these well-settled principles of law, I find and conclude that Claimant, as the surviving Widow of Decedent, is entitled to an award of Death Benefits, commencing on March 31, 2000, the day after her husband's death, based upon the National Average Weekly Wage \$450.64 as of that date, pursuant to Section 9, as I find and conclude that Decedent's lung cancer and death resulted from his maritime exposure to asbestos dust and fibers, welding fumes and grinding dust. The Death Certificate certifies as the immediate cause of death, "Extensive stage small cell lung cancer" (RX 8), and I have already found above that Decedent's lung cancer constitutes a work-related injury. Thus, I find and conclude that Decedent's death resulted from and was related to his work-related injury for which his estate will be receiving permanent partial impairment benefits from November 19, 1999 until his death on March 30, 2000.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills" **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on**

reconsideration, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the

appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal, supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of her husband's work-related injury in a timely fashion and requested appropriate medical care and treatment. However, neither Employer would accept the claim and authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, in view of the foregoing, EBC is responsible for the medical expenses relating to the diagnosis, evaluation and palliative care of Decedent's lung cancer. Such benefits shall begin on November 19, 1999 and shall be subject to the provisions of Section 7 of the Act. Some of these medical expenses are in evidence as CX 11 - CX 12, CX 14 - CX 16.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Respondents timely controverted the entitlement to benefits by the Claimant and Decedent.

Responsible Employer

The EBC or Employer II as a self-insurer is the party responsible for payment of benefits under the rule stated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo**, 350 U.S. 913 (1955). Under the last employer rule of **Cardillo**, the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment,

should be liable for the full amount of the award. **Cardillo**, 225 F.2d at 145. See **Cordero v. Triple A. Machine Shop**, 580 F.2d 1331 (9th Cir. 1978), **cert. denied**, 440 U.S. 911 (1979); **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977). Claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli. **Tisdale v. Owens Corning Fiber Glass Co.**, 13 BRBS 167 (1981), **aff'd mem. sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor**, 698 F.2d 1233 (9th Cir. 1982), **cert. denied**, 462 U.S. 1106, 103 S.Ct. 2454 (1983); **Whitlock v. Lockheed Shipbuilding & Construction Co.**, 12 BRBS 91 (1980). For purposes of determining who is the responsible employer or carrier, the awareness component of the **Cardillo** test is identical to the awareness requirement of Section 12. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205 (1985).

The Benefits Review Board has held that minimal exposure to some asbestos, even without distinct aggravation, is sufficient to trigger application of the **Cardillo** rule. **Grace v. Bath Iron Works Corp.**, 21 BRBS 244 (1988); **Lustig v. Todd Shipyards Corp.**, 20 BRBS 207 (1988); **Proffitt v. E.J. Bartells Co.**, 10 BRBS 435 (1979) (two days' exposure to the injurious stimuli satisfies **Cardillo**). Compare **Todd Pacific Shipyards Corporation v. Director, OWCP**, 914 F.2d 1317 (9th Cir. 1990), **rev'g Picinich v. Lockheed Shipbuilding**, 22 BRBS 289 (1989).

As Decedent worked for EBC until 1990, as he was exposed to asbestos dust and fibers until the early 1980s, as he was exposed to welding fumes and grinding dust until the late 1980s and as EBC was a self-insurer under the ACT during those time periods, EBC is responsible for the benefits awarded herein.

WEC is dismissed as a party herein and an appropriate **ORDER** will be entered to that effect.

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **Director, OWCP v. Luccitelli**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992), **rev'g Luccitelli v. General Dynamics Corp.**, 25 BRBS 30 (1991); **Director, OWCP v. General Dynamics Corp.**, 982 F.2d 790 (2d Cir. 1992); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989);

Director, OWCP v. Cargill, Inc., 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. See **Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), *rev'd and remanded on other grounds sub nom. Director v. Berstresser*, 921 F.2d 306 (D.C. Cir. 1990); **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), *aff'd*, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, *supra*, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, *supra*.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678

F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976).

An x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. **Topping v. Newport News Shipbuilding**, 16 BRBS 40 (1983); **Musgrove v. William E. Campbell Co.**, 14 BRBS 762 (1982).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991). In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have caused claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron)**, *supra*.

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has consistently held that, except in hearing loss cases, Section 8(f) only applies to schedule injuries exceeding 104 weeks. **Byrd v. Toledo Overseas Terminal**, 18 BRBS 144, 147 (1986); **Strachan Shipping Co. v. Nash**, 15 BRBS 386, 391 (1983), **aff'd in relevant part**, 760 F.2d 569 (5th Cir. 1985), **on reconsideration en banc**, 782 F.2d 513 (5th Cir. 1986).

Section 8(f) relief is not available to the employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

In **Huneycutt v. Newport News Shipbuilding & Dry Dock Co.**, 17 BRBS 142 (1985), the Board held that where permanent partial disability is followed by permanent total disability and Section 8(f) is applicable to both periods of disability, employer is liable for only one period of 104 weeks. In **Huneycutt**, the claimant was permanently partially disabled due to asbestosis and then became permanently totally disabled due to the same asbestosis condition, which had been further aggravated and had worsened. Thus, in **Davenport v. Apex Decorating Co.**, 18 BRBS 194 (1986), the Board applied **Huneycutt** to a case involving permanent partial disability for a hip problem arising out of a 1971 injury and a subsequent permanent total disability for the same 1971 injury. See also **Hickman v. Universal Maritime Service Corp.**, 22 BRBS 212 (1989); **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78 (1989); **Henry v. George Hyman Construction Company**, 21 BRBS 329 (1988); **Bingham v. General Dynamics Corp.**, 20 BRBS 198 (1988); **Sawyer v. Newport News Shipbuilding and Dry Dock Co.**, 15 BRBS 270 (1982); **Graziano v. General Dynamics Corp.**, 14 BRBS 950 (1982) (where the Board held that where a total permanent disability is found to be compensable under Section 8(a), with the employer's liability limited by Section 8(f) to 104 weeks of compensation, the employer will not be liable for an additional 104 weeks of death benefits pursuant to Section 9 where the death is related to the injury compensated under Section 8 as both claims arose from the same injury which, in combination with a pre-existing disability resulted in total disability and death); **Cabe v. Newport News Shipbuilding and Dry Dock Co.**, 13 BRBS 1029 (1981); **Adams, supra**.

However, the Board did not apply **Huneycutt** in **Cooper v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 284, 286 (1986), where claimant's permanent partial disability award was for asbestosis and his subsequent permanent total disability award was precipitated by a totally new injury, a back injury, which was unrelated to the occupational disease. While it is consistent with the Act to assess employer for only one 104 week period of liability for all disabilities arising out of the same injury or occupational disease, employer's liability should not be so limited when the subsequent total disability is caused by a new distinct traumatic injury. In such a case, a new claim for a new injury must be filed and new periods should be assessed under the specific language of Section 8(f). **Cooper, supra**, at 286.

However, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Head and Hachette**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, **ipso facto**,

establish a pre-existing disability for purposes of Section 8(f). **American Ship-building v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. **Sacchetti v. General Dynamics Corp.**, 14 BRBS 29, 35 (1981); **aff'd**, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, **viz**, a defect in the human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), **aff'g**, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee. **Psyched**, **supra**, at 681 F.2d 37.

On the basis of the totality of the record, I find and conclude that EBC has not satisfied these requirements because the record reflects that Decedent died as a result of his lung cancer, a fatal disease **per se**. (CX 1) I note that no other medical condition is listed on Decedent's death certificate.

As Decedent was a voluntary retiree and as benefits are being awarded under Section 8(c)(23) for Decedent's lung cancer (CX 1), only Decedent's prior pulmonary problems can qualify as a pre-existing permanent partial disability, which, together with subsequent exposure to the injurious stimuli, would thereby entitle the Employer to Section 8(f) relief. In this regard, **see Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 85 (1989).

In **Adams**, the Benefits Review Board held at page 85:

"Regarding Section 8(f) relief and the Section 8(c)(23) claim, we hold, as a matter of law, that Decedent's pre-existing hearing loss, lower back difficulties, anemia and arthritis are not pre-existing permanent partial disabilities which can entitle Employer to Section 8(f) relief because they cannot contribute to Claimant's disability under Section 8(c)(23). A Section 8(c)(23) award provides compensation for permanent partial disability due to occupational disease that becomes manifest after voluntary retirement. **See, e.g., MacLeod v. Bethlehem Steel Corp.**, 20 BRBS 234, 237 (1988); **see also** 33 U.S.C. §§908(c)(23), 910(d)(2). Compensation is awarded based solely on the degree of permanent impairment arising from the occupational disease. **See** 33 U.S.C. §908(c)(23). Section 8(f) relief is only available where claimant's disability is not due to his second injury alone. In a Section 8(c)(23) case, a pre-existing hearing loss, or back,

arthritic or anemic conditions have no role in the award and cannot contribute to a greater degree of disability, since only the impairment due to occupational lung disease is compensated. In the instant case, therefore, only Decedent's pre-existing COPD could have combined with Decedent's mesothelioma to cause a materially and substantially greater degree of occupational disease-related disability. Accordingly, Decedent's other pre-existing disabilities cannot serve as a basis for granting Section 8(f) relief on the Section 8(c)(23) claim. Similarly, with regard to Section 8(f) relief and the Section 9 Death Benefits claim, only Decedent's COPD could, as a matter of law, be a pre-existing disability contributing to Decedent's death in this case. The evidence of record establishes a contribution from the COPD to Decedent's death, in addition to respiratory failure from mesothelioma. **See generally Dugas (v. Durwood Dunn, Inc.), supra, 21 BRBS at 279.**"

In **Adams**, the Board noted, "there is evidence that prior to contracting mesothelioma, Decedent suffered from chronic obstructive pulmonary disease (COPD), hearing loss, lower back difficulties, anemia and arthritis. The Director argues that Employer failed to establish any elements for a Section 8(f) award based on Claimant's pre-existing chronic obstructive pulmonary disease, back condition, arthritis and hearing loss."

However, in this case at bar, Decedent was in fairly good health at the time of his voluntary retirement on November 30, 1990 (CX 13), and his lung cancer did not become manifest, and was not diagnosed, until November 19, 1999, at which time he had the chest x-ray showing that fatal mass. (CX 8 at 38)

In view of the foregoing, the Employer is not entitled to Section 8(f) relief on the basis of the Board's holding in **Adams, supra**.

Section 8(f) relief is not available to the Employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom., Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director, OWCP**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

Moreover, Employer's liability is not limited pursuant to Section 8(f) where Claimant's disability did not result from the combination of coalescence of a prior injury with a present one. **Duncanson-Harrelson Company v. Director, OWCP**, 644 F.2d 827 (9th Cir. 1981). Moreover, the Employer has the burden of proving that three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th

Cir. 1982).

In the case at bar, the Employer relies upon Decedent's extensive smoking history in support of its argument that Section 8(f) is applicable herein. Decedent was in fairly good health when he retired voluntarily in 1990 (CX 13), and his lung cancer was not diagnosed until November 19, 1999. Lung cancer, a fatal disease, alone caused Decedent's death, and there was no coalescence or combination with any underlying cardiac disease, and, even assuming the existence of such coalescence, Section 8(f) relief is not permissible pursuant to the Board's holding in **Adams, supra**, a case neither cited nor distinguished by the Employer.

Moreover, the Benefits Review Board has held, as a matter of law, that a decedent's pre-existing hearing loss, lower back difficulties, anemia and arthritis are not pre-existing permanent partial disabilities which can entitle employer to Section 8(f) relief because they **cannot contribute** to decedent's disability under Section 8(c)(23). **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 85 (1989). In **Adams**, the Board held that Section 8(c)(23) compensates "only the impairment due to occupational lung disease" and "only decedent's pre-existing COPD (chronic obstructive pulmonary disease) could have combined with decedent's mesothelioma to cause a materially and substantially greater disease of occupational disease-related disability. Accordingly, decedent's other pre-existing disabilities cannot serve as a basis for granting Section 8(f) relief on the Section 8(c)(23) claim. Similarly, with regard to a Section 9 Death Benefits claim, only decedent's COPD could, as a matter of law, be a pre-existing disability contributing to decedent's death in this case." **Adams, supra**, at 85.

In the case **sub judice**, EBC has not demonstrated the existence of such pre-existing permanent partial disability and, **a fortiori**, Section 8(f) relief is not available.

The Benefits Review Board has held that the Administrative Law Judge erred in setting a 1979 commencement date for the permanent partial disability award under Section 8(c)(23) since x-ray evidence of pleural thickening alone is not a basis for a permanent impairment rating under the AMA Guides. Therefore, where the first medical evidence of record sufficient to establish a permanent impairment of decedent's lungs under the AMA Guides was an April 1985 medical report which stated that decedent had disability of his lungs, the Board held that the permanent partial disability award for asbestos-related lung impairment should commence on March 5, 1985 as a matter of law. **Ponder v. Peter Kiewit Sons' Company**, 24 BRBS 46, 51 (1990).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the EBC as a self-insurer. Claimant's attorneys shall file a fee application concerning services rendered and costs incurred in representing Claimant after June 20, 2001, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition shall be filed within thirty (30) days of receipt of this decision and EBC's counsel shall have fourteen (14) days to comment thereon.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. Electric boat Company as a self-insured Employer (EBC) shall pay to Claimant, as executrix of the Decedent's estate, compensation for one hundred (100%) percent permanent partial impairment from November 19, 1999 through March 30, 2000, based upon the National Average Weekly Wage of \$450.64, such compensation to be computed in accordance with Sections 8(c)(23) and (2)(10) of the Act.

2. EBC shall also pay Decedent's widow, Donna M. Bania, ("Claimant"), Death Benefits from March 31, 2000, based upon the National Average Weekly Wage of \$450.64, in accordance with Section 9 of the Act, and such benefits shall continue for as long as she is eligible therefor.

3. EBC shall also reimburse or pay Claimant reasonable funeral expenses of \$1,590.00 pursuant to Section 9(a) of the Act. (CX 3)

4. Interest shall be paid by EBC on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director. Interest shall also be paid on the funeral benefits untimely paid by the Employer.

5. EBC shall pay for such reasonable, appropriate and necessary medical care and treatment as the Decedent's work-related injury referenced herein required, subject to the provisions of Section 7 of the Act, and such medical expenses began on November 19, 1999.

6. Claimant's attorneys shall file, within thirty (30) days

of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to EBC's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on June 20, 2001.

6. Westinghouse Electric Company shall be **DISMISSED** as a party to this proceeding.

A
DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts
DWD:jl